

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1398-CR

Cir. Ct. No. 2009CF390

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW R. BALLENGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Andrew Ballenger appeals from a judgment convicting him of armed robbery as party to the crime and from an order denying his postconviction motion. On appeal, Ballenger challenges the sufficiency of the

evidence, the jury instructions, and the assistance provided by his trial counsel. We affirm.

¶2 The charges against Ballenger arose from the armed robbery of a Domino’s Pizza in Delavan. While Ballenger concedes that the armed robbery occurred, he argues that the evidence was not sufficient to convict him of the armed robbery as party to the crime.

¶3 The State must prove each essential element of the crime beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We review the sufficiency of the evidence, direct and circumstantial, to determine whether the evidence, “viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). We must accept the reasonable inferences drawn from the evidence by the jury, which is the sole arbiter of the credibility of the witnesses. *Poellinger*, 153 Wis. 2d at 506-07. If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the conviction. *State v. Hamilton*, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984).

¶4 Party to the crime liability under WIS. STAT. § 939.05 (2009-10)¹ arises when a defendant intentionally aided and abetted the commission of the crime or was a member of a conspiracy to commit a crime. WIS JI—CRIMINAL 401.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either:

[A]ssists the person who commits the crime; or is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

Id. “To intentionally aid and abet [the crime], the defendant must know that another person is committing or intends to commit the crime ... and have the purpose to assist in the commission of that crime.” *Id.* “A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins another for the purpose of committing that crime.” *Id.* In contrast, a person does not aid and abet if the person “is only a bystander or spectator and does nothing to assist the commission of a crime.” *Id.*

¶5 The essence of Ballenger’s challenge to the sufficiency of the party to the crime evidence is that the jury should have believed him when he denied knowledge that a co-actor was going to rob the Domino’s. The jury had to weigh and assess all of the evidence, including Ballenger’s denial. The evidence before the jury, viewed in the light most favorable to the verdict, was as follows.

¶6 The Domino’s Pizza store was robbed by a gun-wielding man. The employees put money in a backpack provided by the robber. Two weeks later, Ballenger was questioned by police about the Domino’s robbery and other similar armed robberies. Ballenger acknowledged that within the last two months, he had been involved in several of those robberies with Terrence Walker, Michael Boyle and others. In an interview with police, which was played for the jury and for which a transcript was created and admitted into evidence, Ballenger admitted that he was involved in five prior robberies of gas stations and a pizza place. Ballenger helped keep records of the proceeds of the robberies and occasionally acted as the get-away

driver. In one of the gas station robberies, Ballenger initially denied entering the gas station with Walker, but later admitted that a photograph depicted him carrying a pipe in the gas station while Walker threatened the clerk and took money. Ballenger viewed his role in the criminal enterprise as informative: he instructed his co-actors how to hold a gun and how to fight. In another robbery, Ballenger dropped off Walker, who committed a robbery; waited for him to return; and drove him away with the stolen cash. Ballenger described other robberies in which he played a supporting role.

¶7 With regard to the Domino's robbery at issue in this case, Ballenger stated that he and Boyle were shopping in a nearby Walmart while Walker robbed the Domino's. Boyle parked the vehicle at the far end of the Walmart parking lot among cars for sale. Once parked, the vehicle was closer to the back door of the Domino's than it was to the front door of Walmart. Ballenger and Boyle left Walker in the vehicle while they entered the Walmart. Ballenger claimed he was not aware Walker was going to rob the Domino's. When Walker reached him by telephone, Ballenger realized that Walker had committed a robbery. After Walker, Boyle and Ballenger fled the scene in the same vehicle, Walker directed them to a dumpster where he had hidden the backpack with the money from the Domino's robbery. While Walker ran to the dumpster, Ballenger and Boyle warned Walker that the police were approaching.

¶8 From this evidence, the jury could have reasonably inferred that Ballenger was a party to the Domino's robbery: he either aided and abetted the commission of the crime (i.e., his involvement in the Domino's robbery was greater than he admitted) or he conspired with the co-actors for the purpose of committing the Domino's robbery. In addition, Ballenger assisted Walker in retrieving the backpack, warned Walker that the police were approaching, and assisted Walker in

fleeing the scene. The jury was aware that Ballenger had been involved in other robberies with the same co-actors. Ballenger's admitted involvement after the Domino's robbery and reasonable inferences from the rest of the evidence support the jury's verdict that Ballenger was guilty of armed robbery as party to the crime. The jury was not required to give weight to Ballenger's claim that he did not know Walker was going to rob the Domino's.

¶9 Ballenger next challenges the jury instructions regarding party to the crime liability and the elements of the crime. The party to the crime instruction stated that to convict Ballenger, the State had to prove beyond a reasonable doubt that Ballenger “intentionally aided and abetted the commission of *an armed robbery* or was a member of a conspiracy to commit that crime.” (Emphasis added.) Ballenger argues that, because the jury heard evidence of other armed robberies in which Ballenger participated, telling the jury to consider “an armed robbery” did not sufficiently emphasize that the jury had to decide Ballenger's guilt in the Domino's robbery, and the jury might have been confused. With regard to the instructions on the elements, Ballenger argues that the circuit court's repeated references to “the defendant or another person” as it identified the actor in relation to the elements could have led the jury to find that Ballenger was guilty as party to an armed robbery by someone whom Ballenger did not aid or abet.² Ballenger's trial counsel did not object to any of the instructions.

¶10 Ballenger argues that the errors in the jury instructions were plain and should be reviewed by this court. We agree with the State that Ballenger's failure to

² For example, the circuit court instructed the jury: “The third element, that the *defendant or another person* took the property with intent to steal.” (Emphasis added.)

object to the jury instructions precludes appellate review of the alleged errors. *State v. Pask*, 2010 WI App 53, ¶9, 324 Wis.2d 555, 781 N.W.2d 751; WIS. STAT. § 805.13(3). Allegations of plain error do not cure Ballenger’s forfeiture. *State v. Damon*, 140 Wis. 2d 297, 304, 409 N.W.2d 444 (Ct. App. 1987); *Best Price Plumbing, Inc. v. Erie Ins. Exch.*, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419.

¶11 In the alternative, Ballenger argues that if the jury instructions were not plain error, then his trial counsel was ineffective for not objecting to them. Ballenger brought an ineffective assistance of counsel claim postconviction. The circuit court denied relief because Ballenger did not present trial counsel to testify about why he did not object to the instructions. Most importantly, the circuit court concluded that the instructions were not flawed. We agree with the circuit court that the instructions were not flawed and did not confuse the jury. Therefore, Ballenger cannot establish that he was prejudiced by trial counsel’s failure to object to the instructions.

¶12 “There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel’s performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel performed deficiently and prejudiced the defendant are questions of law that we review de novo. *State v. Sanchez*, 201 Wis. 2d 219, 236-37, 548 N.W.2d 69 (1996). We need not consider whether trial counsel’s performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *Id.*

¶13 To establish prejudice “the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense.” *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citation omitted).

¶14 The challenged jury instructions must be viewed in the context of all of the instructions. *State v. Ellington*, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 707 N.W.2d 907. A jury instruction is not error unless “the instructions, when viewed as a whole, misstated the law or misdirected the jury.” *Id.* (citation omitted).

¶15 After considering the instructions in context, we are not persuaded that the party to the crime jury instruction suggested to the jury that it was to assess Ballenger’s guilt for any crime other than the armed robbery of the Domino’s. The instructions tied the elements of the crime of armed robbery to the victims, specific employees of Domino’s. The court instructed the jury that it could only consider evidence of other robberies on the issues of “motive, opportunity, intent, preparation or plan, knowledge, absence of mistake or accident, and context or background.” The verdict form also focused the jury’s attention on the Domino’s robbery. Finally, the evidence at trial regarding the Domino’s robbery was limited to the actions of Ballenger, Walker, and Boyle, so the jury could not have suspected that others were involved when the circuit court referred to “the defendant and another person” when instructing on the elements. The jury instructions were not flawed and did not mislead the jury.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2011-12).

